

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1432

To be argued by
ALLEN R. BENTLEY

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1432

UNITED STATES OF AMERICA,

Appellee,

—v.—

RICHARD PAGLIALONGA,

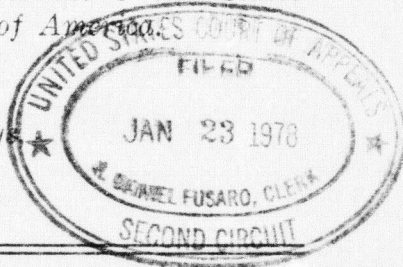
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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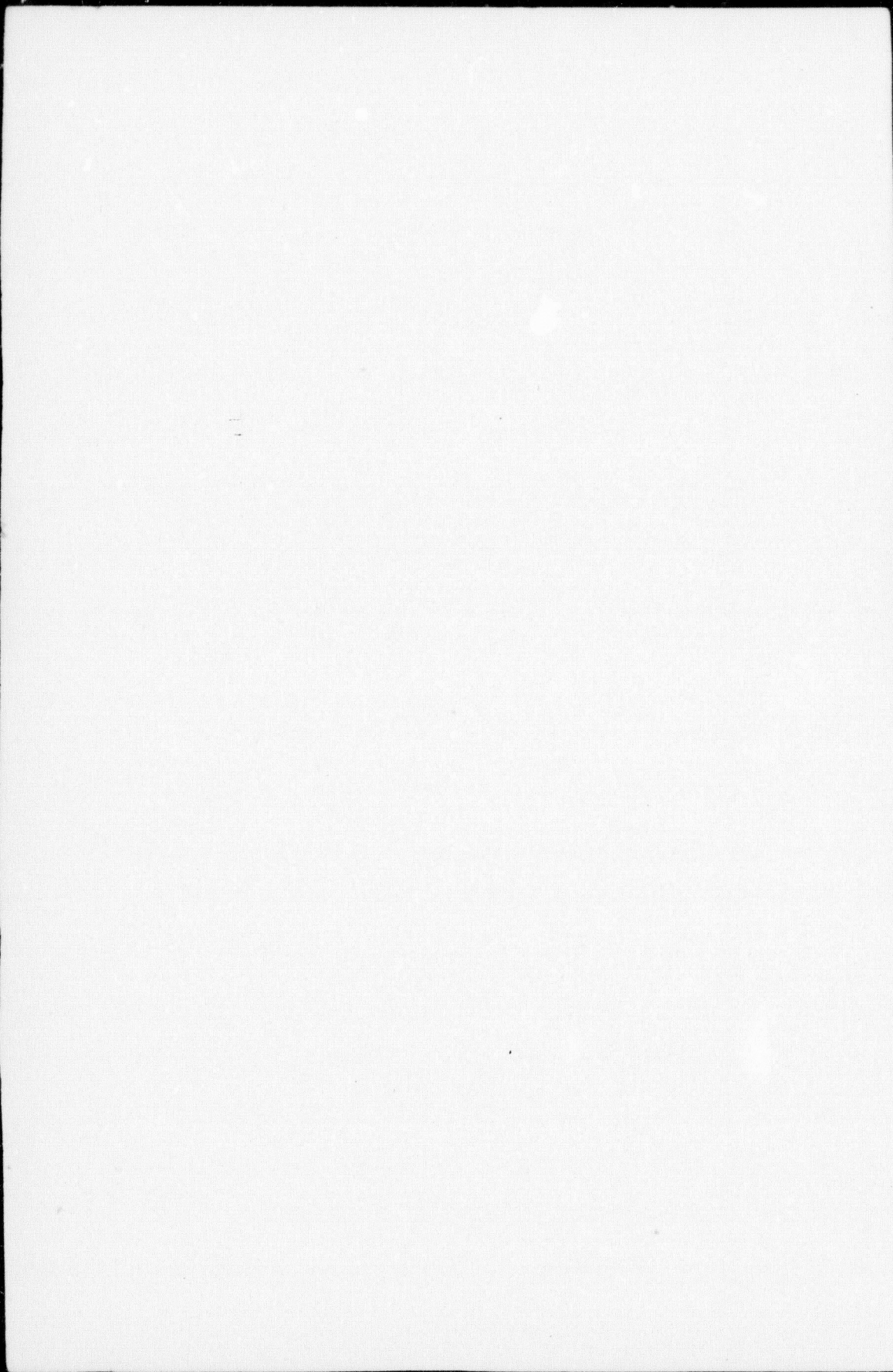


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Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Richard Paglialonga appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on September 30, 1977, after a six-day trial before the Honorable Charles L. Brieant, Jr., United States District Judge, and a jury.

Indictment 77 Cr. 210 was filed on March 25, 1977, in four counts. Count One charged Paglialonga, Edward White, Ilene Baker, William Lacey and Milton Thompson, a/k/a "Skip," with conspiring to import, to distribute, and to possess with intent to distribute cocaine, in violation of Title 21, United States Code, Section 846. Count Two charged Lacey and Thompson with possessing with intent to distribute approximately one-half pound of cocaine in January, 1976, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), and Title 18, United States Code, Section 2. Count Three

charged Paglialonga with possessing with intent to distribute approximately four ounces of cocaine in January, 1976, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A). Count Four charged White with possessing with intent to distribute approximately 70 pounds of marijuana in the form of hashish on February 1, 1977, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B).

Trial of Paglialonga, Lacey and Baker commenced on July 20, 1977.* On July 26, 1977, at the close of the Government's case, Judge Brieant granted Lacey's motion pursuant to F.R.Crim. P.29 for a judgment of acquittal on Count One. Later on July 26, 1977, during questioning of a witness called by Paglialonga, Judge Brieant granted Lacey's motion for a mistrial on Count Two based on prejudicial testimony elicited by Paglialonga's attorney as part of his defense.** On July 27, 1977, the jury found Paglialonga guilty on Count One and not guilty on Count Three and Baker not guilty on Count One. On September 30, 1977, Judge Brieant sentenced Paglialonga to incarceration for two and one-half years, to be followed by three years of special parole.

Paglialonga is enlarged on bail pending appeal.

* White had been arrested on February 1, 1977 but jumped bail before the indictment was filed and did not appear for pleading or any of the other proceedings in this case. Thompson has never been apprehended.

** Lacey was re-tried on Count Two in a six-day jury trial before Judge Cannella which began on September 14, 1977. On September 21, 1977, the jury found Lacey guilty. On November 7, 1977, Judge Cannella sentenced Lacey to incarceration for two and one-half years, to be followed by three years of special parole.

Statement of Facts

A. Synopsis

Through the testimony of two unindicted co-conspirators, Harvey Cohen and Marsha Renee Brown, corroborated by other witnesses, passport entries, telephone records, airline tickets and other documentary evidence, the Government established that Paglialonga had participated in a conspiracy which successfully smuggled more than one pound of cocaine into the United States from Lima, Peru in January, 1976. The evidence showed that two separate trips to Lima had been necessary to accomplish the objective of the conspiracy, because the first expedition was disrupted when Peruvian authorities arrested one co-conspirator on cocaine charges and unsuccessfully interrogated others about the offense. Paglialonga played an integral role in both trips: on the first, he hid the cocaine to prevent its seizure by the Peruvian police; on the second, he returned to Lima, retrieved the cocaine and accompanied a co-conspirator on a circuitous journey designed to facilitate importation of the cocaine into the United States. Paglialonga's defense acknowledged that he had made both trips to Lima. The defense asserted, however, that his conduct was not criminal because (1) his hiding of the cocaine had been justified by "necessity"; (2) on returning to the United States, following the first trip to Peru, he announced his withdrawal from the conspiracy; and (3) his second trip to Peru was the product of coercive telephone threats.

B. Government's Case

1. The First Trip to Lima, August-September, 1975

Harvey Cohen and Marsha Renee Brown testified that in August, 1975, Edward White came to their apartment in Manhattan and sought to enlist Brown in a Peruvian

cocaine-smuggling venture. (Tr. 107-09, 339).^{*} White said he had already made arrangements to obtain cocaine in Lima and had recruited a courier to bring it back to the United States. (Tr. 339). White knew that Brown had studied plastics and had experience in building prefabricated false-sided suitcases, which she and Cohen used in smuggling hashish into the United States from India. (Tr. 110, 172, 207-08, 223-25, 333, 480-81). White offered Brown \$10,000 if she would make the necessary molds and travel to Peru, where she would construct two false-sided suitcases, each enclosing cocaine which White expected to obtain. (Tr. 110, 340, 482). Brown accepted White's offer. (Tr. 110, 341). White gave her cash with which to purchase her tickets. (Tr. 342, 482-83).

Brown grew apprehensive about the trip. She did not know Spanish, she had never been to Peru, and she had never dealt with cocaine. (Tr. 340). She contacted the defendant Paglialonga, told him about the trip, and offered him \$5000 if he would accompany her to Peru to provide "protection." (Tr. 113, 340).^{**} Paglialonga accepted the offer. (Tr. 113, 341).

^{*} Subsequent references to the trial transcript and Government exhibits will be abbreviated as "Tr." and "GX," respectively.

The Government called Comisario Primero Alejandro Rubio Bizerra, a member of the Peruvian police force assigned to its narcotics bureau from February, 1975 to November, 1976. Comisario Rubio testified that cocoa leaves, from which cocaine is derived, are grown in Peru, both legally and illegally. (Tr. 38).

^{**} Paglialonga was associated with Cohen and Brown in a now-defunct T-shirt importing business called Honky-Tonkas, Inc. (Tr. 334-38). Cohen recalled that Paglialonga had been present at the August meeting with White. (Tr. 339). Brown testified that Paglialonga had not been present at that meeting, but had agreed to act as her "protector" in a telephone conversation a week and a half before her departure for Peru. (Tr. 107-112).

On August 29, 1975, Brown flew from New York to Lima. (Tr. 113; GX 26A).^{*} She checked into White's hotel. (Tr. 115). Paglialonga, who had arrived in Peru the day before, was staying elsewhere. (Tr. 115; GX 29A). After a few days, White made contact with Paglialonga and Brown and told them to go to a real estate broker and obtain a hacienda near the ocean. Brown followed his instructions and rented a hacienda in Miraflores, a middle-class suburb of Lima. (Tr. 117-19). She and Paglialonga checked out of their hotels and moved, with their luggage, to Miraflores. (Tr. 119). The next day White appeared at the hacienda and showed Brown the cocaine. The cocaine was then secreted in the false-sided suitcases. (Tr. 119-20). Since White had not been able to obtain as much cocaine as he expected, White, Paglialonga and Brown took a sight-seeing trip to Machu Picchu to pass the time while White waited for additional cocaine. (Tr. 120).

On September 6, 1975—shortly after White, Paglialonga and Brown had returned to Miraflores from Machu Picchu—White was arrested on cocaine charges by the Peruvian police. (Tr. 121).^{**} Brown was in a car with Paglialonga, waiting for White to come out of the hacienda, when she saw White being driven away by a number of men whom she later learned were police officers. (Tr. 122). Brown and Paglialonga waited awhile, then re-entered the hacienda. Brown opened the suitcases in which the cocaine had been hidden, found it still there,

^{*} Comisario Rubio had been transferred to the immigration bureau of the Peruvian police force in February, 1977. He testified that all the Peruvian entry and exit stamps in the United States passports of Paglialonga, Brown and Cohen were authentic passport entries made by his government. (Tr. 33-34, 98-99; GX 26A, 27A, 29A).

^{**} Comisario Rubio, who spoke English, had been called upon to question White, Paglialonga and Brown shortly after White's arrest. He corroborated Brown's testimony concerning White's arrest and the post-arrest interrogations. (Tr. 40-45).

handed it to Paglialonga and told him to do something with it. (Tr. 122). Paglialonga put the cocaine in a bag and asked the owner of the house for a ride to town. (Tr. 123). When the owner returned from chauffeuring Paglialonga, she gave Brown a ride to the police station. At the police station, Brown asked about White and was told to return to the hacienda, where she would be contacted. (Tr. 124). Brown returned to the hacienda and met Paglialonga, who told Brown that he had buried the cocaine. (Tr. 124-25).

Later that day the police called. Thereafter, Paglialonga and Brown went to a police station other than the one at which Brown had made her initial inquiry and found that White was being held on narcotics charges. (Tr. 125, 129). From the police station, Paglialonga, Brown and several officers returned to the hacienda. The police searched the hacienda and seized some plastic bags. (Tr. 126). Paglialonga, Brown and the officers returned to the police station, where Paglialonga and Brown were questioned by Comisario Rubio. (Tr. 126). Paglialonga acknowledged knowing White but denied any knowledge of White's activities and claimed that he himself had not come to Peru to purchase narcotics. (Tr. 44). Paglialonga and Brown were released, although the police kept their passports. (Tr. 44-45, 127).

After being released, Brown went to the American Embassy in an effort to obtain a lawyer for White. After Brown's visit to the Embassy, Paglialonga took her to a bush located about 15 minutes from the hacienda, where, he told her, he had buried the cocaine. (Tr. 127). The next day Brown gave White's luggage to a woman named "Linda," whose name and number she had found in the luggage, and called Cohen in New York, who told her to get out of Peru. (Tr. 128, 343, 490). When their passports were returned, a day or two later, Paglialonga and Brown left the country together, arriving in Los Angeles on September 10, 1975. (Tr. 130; GX 26A, 29A).

2. The Second Trip to Lima, December, 1975- January, 1976

In late December, 1975, Edward White met with Cohen, Brown and Paglialonga in Marhattan. (Tr. 133, 195-96, 344). White explained that he had been released by the Peruvian authorities because the arrest had been a "Mickey Mouse bust" and the resulting prosecution failed since no cocaine had been found. (Tr. 134, 345). White asked what had happened to the cocaine. When informed that the cocaine had been buried in a hole on the edge of a cliff in Lima, White immediately proposed a trip to Peru to retrieve it. (Tr. 134, 345-46). Since White was too well known to the Peruvian authorities and Brown was extremely apprehensive about returning to Peru, it was decided that Cohen and Paglialonga would make the trip. (Tr. 134, 346).

White then outlined a strategy for successfully bringing the cocaine back to the United States. (Tr. 134, 347). White told Cohen and Paglialonga that in order to avoid flying directly between the United States and Peru, they should fly to Guayaquil, Ecuador, and from Guayaquil they should proceed to Lima by a bus that crossed the Andes. (Tr. 134, 347). White suggested that once Paglialonga and Cohen had located the cocaine in Lima, they should take the bus back to Guayaquil. (Tr. 148). From Guayaquil, White recommended that Cohen and Paglialonga fly to Curacao, where they would rendezvous with an unnamed courier, to be arranged by Cohen and Brown, who would take possession of the cocaine and carry it on the Curacao-New York leg of the journey. (Tr. 348).

On December 22, 1975, Cohen and Paglialonga began to make the necessary arrangements for their trip to Peru to obtain the cocaine. They purchased round-trip tickets for a flight from New York to Guayaquil, leav-

ing their return reservations "open" because of the uncertainty involved in the untested itinerary they were to follow. (Tr. 350; GX 73). Brown adapted a soft brown leather suitcase belonging to Paglialonga to permit the hiding of the cocaine between wood panels, which she added, and the exterior of the case. (Tr. 138, 214, 410; GX 4). Cohen and Paglialonga left New York on December 22, 1975 and arrived in Guayaquil the following day, taking the altered suitcase with them. (Tr. 341; GX 27A, 29A, 73). From Guayaquil they took a 15-hour, two-day bus trip to Lima, crossing the border between Ecuador and Peru on Christmas Eve. (Tr. 353; GX 27A, 29A).

Once in Lima, Paglialonga told Cohen that he was going to attempt to dig up the cocaine. If it was still where he had buried it, Paglialonga said, he would put it in the sides of his suitcase and bring it to Cohen. (Tr. 357). Not long after that, Paglialonga came to Cohen's hotel room and gave Cohen a tennis racket. In a zippered compartment attached to the tennis racket cover, designed for the storage of tennis balls, Cohen found cocaine. (Tr. 357-59; GX 53). The two men hid the cocaine in Paglialonga's suitcase. (Tr. 359; GX 4).

After retrieving the cocaine, Paglialonga flew back to Guayaquil, arriving on December 28, 1975, while Cohen returned there by bus, arriving on December 30, 1975. (Tr. 359-60; GX 27A, 29A). Cohen, who carried the suitcase containing the cocaine, was not searched as he crossed the border between Peru and Ecuador. (Tr. 361).

On December 30, 1975, in New York, Brown purchased tickets for a flight to Curacao, leaving New York on December 31, 1975 and returning on January 6, 1976. (Tr. 141; GX 81). The tickets were purchased in the name of Ilene Baker. Brown had promised Baker \$3000 to meet Cohen in Curacao and carry the suitcase contain-

ing cocaine back to New York. (Tr. 215, 320). On December 31, 1975, Baker flew to Curacao to await the cocaine.

After reuniting in Guayaquil on December 31, 1975, Cohen and Paglialonga sought a flight out of South America, but they were unsuccessful. (Tr. 361). Cohen and Paglialonga flew from Guayaquil to Quito, hoping that a flight out of Ecuador would be available. (Tr. 361). Paglialonga was able to book a flight from Quito to Caracas and flew there—ahead of Cohen and carrying no cocaine—arriving on January 4, 1976. (Tr. 362; GX 29). Paglialonga called Quito from Caracas and told Cohen that “the flight was pleasant and the weather was fine,” which, as pre-arranged, indicated to Cohen that he had nothing to fear from the Venezuelan customs inspection. (Tr. 363). Cohen attempted to follow Paglialonga to Caracas but found that to be impossible because a revolution had broken out in Ecuador, bombs were exploding in the street, and the travel bureaus were mobbed with people trying to leave Ecuador. (Tr. 216, 364). Since he was running short of money, Cohen made a collect call to Brown in New York on January 5, 1976. (Tr. 364; GX 61C). Cohen asked Brown to wire him money, and Brown advised him to take whatever flight he could obtain, regardless of its destination. (Tr. 216, 365).

Within minutes of Cohen's call to Brown, Brown spoke to Paglialonga in Caracas. (GX 61C). The following day, January 6, 1976, Paglialonga flew from Caracas to Curacao in order to meet his partner Cohen who had the cocaine. (GX 29A).

Later on January 6, 1976, Cohen found a seat on a flight from Quito to Curacao. He took the suitcase containing the cocaine with him. (Tr. 366; GX 27A, 93). In Curacao, Cohen checked into a hotel as “Mr. Baker” and was given a room which had been rented by Ilene

Baker several days before. Cohen placed the suitcase in the room and had dinner with Baker and Paglialonga. After dinner, in the presence of Baker and Paglialonga, Cohen called Brown and told her that everyone had arrived safely. (Tr. 145, 371-72; GX 62). A day or so later, Cohen removed his possessions from the brown suitcase in which the cocaine was hidden, and Baker packed her possessions in it. (Tr. 372-73). On January 7, 1976, Baker presented her January 6, 1976 Curacao-New York ticket to KLM, and her return flight was rescheduled for the following day. (GX 95).*

On January 8, 1976, Baker and Cohen checked out of the hotel together and boarded a KLM flight for New York. (Tr. 373-74; GX 27A, 91, 94). Cohen disembarked at Aruba, an intermediate stop, while Baker continued on alone to New York. (Tr. 373; GX 27A). Upon arriving in New York, Baker delivered the cocaine-laden suitcase to Brown at 39 Jane Street. (Tr. 145-46, 214-15). On January 10, 1976, Paglialonga left Curacao on a KLM flight bound for New York. Cohen boarded the plane at Aruba, and the two men completed their journey to Cohen's apartment at 39 Jane Street, New York, New York, together. (Tr. 376-77; GX 27A, 29A).

3. Disposition of the Cocaine in New York, January-February, 1976

Cohen, upon returning to New York, opened the brown suitcase, ripped out the linings and found the bags of cocaine. (Tr. 199, 380; GX 3B, 3C, 3D). He

* Cohen testified that in Curacao he, Paglialonga and Baker had made the acquaintance of a couple named "Mort" and "Barbara" from New York. (Tr. 370). Barbara Lewin testified that she and her husband had been in Curacao in January, 1976 and there had met Harvey Cohen, his wife Ilene, and "Richie," whom she identified as Paglialonga. (Tr. 584-85).

proceeded to weigh the cocaine into one-ounce quantities, which he sealed into 16 or 17 clear plastic "Seal-a-Meal" bags. (Tr. 382, 493-94). The day after his packaging of the cocaine, Cohen received a call from a man known to him only as "Billy." (Tr. 389, 390, 496). Billy said he was White's partner and was coming to pay Cohen a visit. (Tr. 391).

Billy came to Cohen's apartment that evening, accompanied by a one-eyed man named "Skip." (Tr. 391). Cohen, Brown and Paglialonga were present when Billy and Skip arrived. (Tr. 394).^{*} Billy and Skip pulled out guns. (Tr. 398-99). Billy asked for the cocaine, to which he claimed he was entitled because he had spent a substantial sum to get White out of jail in South America. (Tr. 394-95). Billy asked how much cocaine had been brought back. Cohen told him. Cohen explained that, given the expense of two separate trips, the most he could give Billy was seven or eight ounces. (Tr. 397-98). Billy agreed. (Tr. 398). Cohen brought out some of the cocaine; Billy opened it and tested it on a mirror. (Tr. 399). Billy and Skip took approximately seven ounces of cocaine and left the apartment. (Tr. 402).

Later that evening, Paglialonga agreed to take a quantity of cocaine in lieu of the \$5000 he had been promised. (Tr. 406-07). The next morning, Paglialonga left 39 Jane Street. (Tr. 158, 404). Paglialonga took approximately four ounces of cocaine with him. (Tr. 158, 201, 405).

On February 4, 1976, Cohen sold one of the five ounces of cocaine which he and Brown had kept as their compensation for participating in the smuggling venture to

^{*} In February, 1977, Cohen and Brown were shown a spread of 12 photographs and independently identified William Lacey as "Billy" and Milton Thompson as "Skip."

John DeRosa, an undercover detective with the New York Drug Enforcement Task Force, for \$1900. (Tr. 444, 502; GX 1). On February 6, 1976, Cohen sold Detective DeRosa the remaining four ounces for \$7600. (Tr. 444, 504; GX 2).*

C. Defendant's Case

The defendant did not take the stand.

The defendant called Marsha Petri, his common law wife. In the summer of 1975, at their home in Fairfax, California, Paglialonga told her that he was going to take a trip to South America. (Tr. 700). The day after he and Brown returned from the trip, Paglialonga told Petri that he had gone to South America to protect Brown, that he had gotten into a "tight" situation, "way over his head," and that he had buried "that drug cocaine." (Tr. 706). He and Brown both stated that they wanted to have nothing more to do with the buried cocaine. (Tr. 194, 707).** In mid-December, however, Paglialonga received a series of telephone calls from an unidentified man who threatened Paglialonga's life if he did not go to New York, talk with Cohen and Brown, and go back to South America. (Tr. 713). After Paglialonga had received several such calls, which made him

* It was stipulated that laboratory analysis showed that the substances sold to Detective DeRosa contained cocaine hydrochloride. (GX 11).

Cohen and Brown were arrested by Detective DeRosa and other officers on August 10, 1976 and charged with A-I felonies in the Special Narcotics Court of the State of New York. (Tr. 102, 325). On February 25, 1977, having cooperated with the New York Drug Enforcement Task Force in several undercover investigations, Cohen and Brown were permitted to plead guilty to an A-III felony and were sentenced to lifetime probation.

** Brown had spent two months in California before returning to New York after her trip to Peru. (Tr. 132).

extremely fearful, Petri herself received one in which the message that Paglialonga had to return to South America was repeated. (Tr. 716, 718). She listened to the caller's message, then dropped the phone and put Paglialonga on the line. (Tr. 718).^{*} The next day, Paglialonga left for New York. (Tr. 720). Paglialonga did not return until mid-January. (Tr. 720). On his return from his second trip, he told Petri that he had dug up the (Tr. 732).

The threatening phone calls, on which the defendant premised his defense of coercion or duress, were not reported to the police. (Tr. 719, 731).

ARGUMENT

The District Court Did Not Err in Charging the Jury With Respect to Paglialonga's Defense of Withdrawal from the Conspiracy.

Paglialonga claims that Judge Brieant erred in that portion of his charge which pertained to the second prong of Paglialonga's defense—the argument that Paglialonga effectuated a valid withdrawal from the conspiracy in a conversation with Marsha Renee Brown in California in September 1975. Paglialonga urged the District Court to charge the jury that one can entirely avoid liability for participating in a criminal conspiracy if he announces his withdrawal before substantial attainment of the objective of the conspiracy. (Tr. 742-45). Judge Brieant declined to give the requested charge. Instead, he informed the jury that withdrawal was not a defense if it occurred after an overt act had been committed. (Tr. 875-78). A review of the cases reveals no federal au-

^{*} Judge Brieant accepted Lacey's contention that the jury might impermissibly infer that Lacey was the threatening caller and granted Lacey's motion for a mistrial. (Tr. 725).

thority supporting Paglialonga's requested instruction, and thus Judge Briant quite properly refused to include it in his charge.

Paglialonga concedes that the legal position he advances is in conflict with well settled legal principles. (Br. 6). He presents no cogent reason to support his request that the law be changed so that withdrawal from a conspiracy *after* an overt act is committed constitutes a defense to the conspiracy charge. To the contrary, it has become axiomatic that for withdrawal to be a defense to a conspiracy charge, the act of withdrawal must occur before the commission of an overt act. As the Supreme Court explained:

"The offence charged in the counts of this indictment is a conspiracy. This offence does not consist both of the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentie*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute." *United States v. Britton*, 108 U.S. 199, 204-05 (1883).

See also *Hyde v. United States*, 225 U.S. 347 (1912).

Thus, once an overt act has been committed, the crime Congress prohibited has occurred, and at that point there is no statutory reason or judicially acknowledged basis for withholding a finding of liability. The more recent cases leave no doubt as to the continued vitality of the proposition that the time for withdrawal is before, not after, an overt act has been committed in furtherance of the conspiracy. *United States v. Monroe*, 552 F.2d 860, 864 (9th Cir. 1977); *United States v. Heathington*, 545 F.2d 972 (5th Cir. 1977); *United States v. Heckman*,

479 F.2d 726 (3d Cir. 1973); *Marino v. United States*, 91 F.2d 691, 695 (9th Cir. 1937), *cert. denied*, 302 U.S. 764 (1938).

The Ninth Circuit, in *United States v. Monroe*, 552 F.2d 860, 864 (1977), rejected an argument quite similar to the one Paglialonga now urges. In *Monroe*, the defendant questioned a charge to the effect that withdrawal from the conspiracy must precede any overt act. The defendant claimed that withdrawal prior to an *unlawful* overt act would be sufficient. The Court rejected the argument and held:

"Monroe's challenge misapprehends the nature of the crime of conspiracy. The crime of conspiracy is complete once there is an agreement to accomplish an unlawful object and one or more overt acts are taken to implement the agreement. *United States v. Feola*, *supra*, 420 U.S. at 694, 95 S.Ct. 1255; *United States v. Thompson*, *supra*, 493 F.2d at 310. The overt act need not be unlawful. *Braverman v. United States*, 317 U.S. 49, 53, 63 S.Ct. 99, 87 L.Ed. 23 (1942); *United States v. Thompson*, *supra*, 493 F.2d at 310; *Blumenthal v. United States*, 158 F.2d 883, 888 (9th Cir. 1946), *aff'd*, 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154 (1947). Thus, to avoid complicity in the conspiracy, one must withdraw before any overt act is taken in furtherance of the agreement."

The Third Circuit and the Fifth Circuit have reached similar results. *United States v. Heathington*, 545 F.2d 972 (5th Cir. 1977); *United States v. Heckman*, 479 F.2d 726 (3rd Cir. 1973).

To reject the long settled rule that withdrawal must come before an overt act is committed and replace it with Paglialonga's position would substantially narrow the

scope of the crime of conspiracy. As the Ninth Circuit recognized in *United States v. Monroe, supra*, the crime of conspiracy is complete when an overt act is committed in furtherance of the unlawful agreement. If the Government had to establish that a particular defendant was a member of the conspiracy when the object of the conspiracy was achieved or an illegal act committed, the crime cognizable by conspiracy would be markedly changed.

The result urged by the defendant would also drastically change the elements of the conspiracy involved in this case. Paglialonga was convicted of violating Title 18, United States Code, Section 846—a narcotics conspiracy. The District Court charged that Paglialonga could not be convicted unless the jury found that an overt act had been committed in furtherance of the conspiracy with which Paglialonga was charged, and created the possibility of a withdrawal defense by delivering the charge which is now at issue. In fact, however, Section 846, unlike the general conspiracy statute, Title 18, United States Code, Section 371, contains no overt act requirement. As it has in certain other specialized areas—*e.g.*, the Sherman Act, see *Nash v. United States*, 229 U.S. 373 (1913), and the Selective Service Act, see *Orear v. United States*, 261 F. 257 (5th Cir. 1919)—in dealing with narcotics conspiracies, Congress has determined that the agreement is serious enough to warrant prosecution and punishment, whether or not an overt act in furtherance thereof occurs. *United States v. Bermudez*, 526 F.2d 89 (2d Cir. 1975). Consequently Paglialonga could not be entitled to an instruction that he is not guilty if he joined the unlawful agreement but withdrew before the objects of the conspiracy were attained.*

* Typically in this Circuit the issue of withdrawal from a conspiracy has been raised in the context of a statute of limitations defense. The defendant claims that he withdrew from the conspiracy before the last overt act was committed, and at a time when the statute of limitations has run. See *United States*

[Footnote continued on following page]

Indeed in the context of this case the defense that Paglialonga withdrew from the conspiracy is fanciful. The conspirators made substantial efforts to achieve their objective during the period preceding the Peruvian arrest which allegedly persuaded Paglialonga to "wash his hands" of the conspiracy. Brown had made the molds for the false-sited suitcases which were to contain the cocaine. Paglialonga, Brown and White had travelled to Lima and sought each other out in that city. Brown had obtained the hacienda in Miraflores that was to be used as a "stash" for the cocaine. White had obtained about a pound of cocaine. The cocaine had been hidden in the suitcases for safekeeping while the conspirators waited for more. Paglialonga—in action that led directly to White's later release from Peru and to the successful importation of the cocaine into the United States—had buried the cocaine to prevent the authorities from seizing it. Paglialonga simply could not nullify the legal effect of his conspiratorial agreement, followed by these many overt acts, by withdrawing when he and Brown returned to the United States in September 1975. Had Paglialonga done nothing else to further the conspiracy, his actions on the first Lima trip illustrate precisely the type of conduct Congress intended the conspiracy laws to prevent.

v. Panebianco, 543 F.2d 447 (2d Cir. 1976); *United States v. Cirillo*, 468 F.2d 1233 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); *United States v. Colasurdo*, 453 F.2d 585 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972); *United States v. Borelli*, 336 F.2d 376 (1964), *cert. denied*, 379 U.S. 960 (1965); *United States v. Witt*, 215 F.2d 580 (2d Cir.), *cert. denied*, 348 U.S. 887 (1954); *United States v. Cohen*, 145 F.2d 82 (2d Cir. 1944), *cert. denied*, 323 U.S. 799 (1945). Implicit in these cases is a recognition of the principle that the commission of an overt act completes the crime of conspiracy; no requirement exists that the Government prove that the objective of the conspiracy was achieved before a defendant is guilty of the crime.

The evidence demonstrated, moreover, that after Paglialonga's alleged withdrawal from the conspiracy, he made the second trip to Peru in order to find the cocaine, and to smuggle the drug into the United States.* Through Paglialonga's efforts the unlawful object of the conspiracy was achieved—the cocaine was smuggled into the United States, and distributed. Thus, not only did Paglialonga not withdraw prior to the time the object of the conspiracy was attained, but he directly participated in the completion of this successful criminal venture which was discovered only because a co-conspirator sold cocaine to an undercover agent.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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of America.*

ALLEN R. BENTLEY,
RICHARD WEINBERG,
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* Paglialonga did not dispute that he had made this second trip to Peru and had located the cocaine for transportation to the United States. He argued through the testimony of his common law wife that while in the United States he had been coerced into making the second trip to Peru. Judge Briant instructed the jury on the coercion defense. (Tr. 884-86).

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ALLEN R. BENTLEY, being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 23rd day of January, 1978,
he served ² ~~1~~ copy of the within brief by placing the same
in a properly postpaid franked envelope addressed:

J. TONY SERRA, ESQ.
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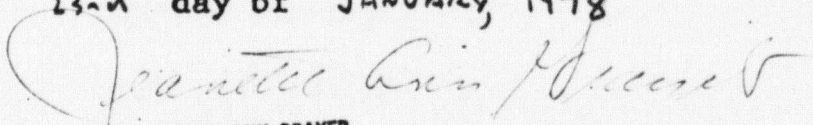
RONALD WOHL, ESQ. (LOCAL COUNSEL)
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And deponent further says that he sealed the said envelope
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Allen R. Bentley

Sworn to before me this

23rd day of January, 1978


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Notary Public, State of New York
No. 24-103375
Quaintance County
Commission Expires March 30, 1979